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Supreme Court, U.S.
FILED
081009 FEB 6 - 2009
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No.

In The SUPREME COURT OF THE UNITED STATES

NANCY MONTGOMERY-WARE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals has jurisdiction to review, on appeal from final judgment of the district court, the issue of whether a *pro se* defendant waived her 6th Amendment Right to Counsel.

2. Whether the district court can adopt the government's proposed tax loss, as set forth in the Presentence Report, to select the sentencing range if that amount was never submitted to or found by the jury and was not admitted by defendant

3. Whether the district court and Eleventh Circuit Court of Appeals use of pattern jury instructions in a 26 U.S.C. § 7201 charge erroneously instructed the jury to find only two elements.

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Montgomery-Ware and respondent United States).

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Nancy Montgomery-Ware respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit affirming her convictions and sentence for tax evasion and related offenses.

OPINIONS BELOW

The Eleventh Circuit's unpublished Opinion (per Circuit Judges Marcus, Wilson and Pryor), was filed September 11, 2008; *see United States v. Ware*, 292 Fed. Appx. 845 (11th Cir. 2008), a copy is attached as Appendix A-3. The Judgment of the United States District Court for the Middle District of Florida was entered December 7, 2007, at *United States v. Ware*, docket # 8:07-00105-CR-T-30-EAS. A copy is attached as Appendix A-20.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit affirming the petitioner's convictions on tax evasion and related charges was filed and entered on September 11, 2008. (A-3). The petitioner's timely petition for rehearing was denied by the Eleventh Circuit on November 10, 2008. (A-1). The United States Supreme Court has jurisdiction to review this opinion of the Court of Appeals pursuant to 28 U.S.C. 1254 (1), and Article III of the United States Constitution.

TEXT OF FEDERAL STATUTE AND RULES OF PROCEDURE INVOLVED

Constitution of the United States Amendment VI: 18 U.S.C. § 3231 ; 26 U.S.C. Section 7201; 28 U.S.C. Sections 1291, 1254; United States Sentencing Guidelines § 2T1.1(a)(2); and Federal Rule of Criminal Procedure 59(a). (A-41)

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On March 27, 2007, Petitioner, Nancy Montgomery-Ware, (hereinafter "Ware" or "petitioner"), was indicted for two counts of attempting to evade and defeat taxes in violation of 26 U.S.C. § 7201, and three counts of failing to file tax returns in violation of 26 U.S.C. § 7203.

A federal magistrate judge held a *Faretta* hearing and arraigned Ware on May 1, 2007, wherein the magistrate found her to have waived her right to counsel. (A-35). Prior to trial, Ware moved to dismiss her indictment on the grounds that the indictment "failed to identify the essential facts of law or regulation" regarding 26 U.S.C. §§ 7201 and 7203. The district court denied the motion.

Ware represented herself at her jury trial, which lasted four days from August 27-30, 2007. The

district court instructed the jury on August 30, 2007, and the jury returned their verdict on the same day finding Ware guilty on all five counts.

On December 6, 2007, Ware was sentenced[1] to incarceration for thirty-three (33) months imprisonment followed by supervised release. This sentence was based on a guideline offense level of 20 and Criminal History Category I. Restitution in the amount of $362,212.24 was ordered[2] as was a $25,000 fine. Petitioner timely appealed her conviction and sentence.

Petitioner filed a written motion with the district court for release and stay pending the outcome of appeal, which the government opposed. The district court denied the motion on March 25, 2008. Because the court did not state with particularity the reasons for denying the motion, petitioner filed a motion to reconsider its order and state its reasoning with particularity. The district court, in denying the motion to reconsider, generally explained that there was no merit to the motion. (A-18). Petitioner reported for imprisonment on April 30, 2008.

After briefing on the matter, the Eleventh Circuit Court of Appeals decided the matter without oral argument, and filed its decision on September 11, 2008. (A-3). Petitioner timely filed a petition for

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[1] Ware was represented by counsel at the sentencing hearing.

[2] Ware paid this amount in full prior to the sentencing hearing.

rehearing, which was denied on November 10, 2008. (A-1).

II. STATEMENT OF FACTS

Ware has practiced pediatric dentistry for about fifteen years during which time she filed tax returns and paid taxes. After marrying Paul Ware 1999, she stopped filing returns and paying income tax.[3] In March 2007, Ware was indicted for two counts of violating 26 U.S.C. § 7201 and three counts of violating 26 U.S.C. § 7203. The first count of the indictment alleged that Ware owed taxes of $126,664 in 2000 and willfully attempted to avoid payment by filing a W-4 form stating that she was exempt from withholding; placing her income in nominee bank accounts; and failing to file a tax return or pay the income tax in violation of 26 U.S.C. § 7201. The second count of the indictment alleged that Ware willfully attempted to avoid payment of $33,483 of income taxes in 2001 through the same actions alleged in count one and by instituting a frivolous

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[3] During the sentencing hearing, Ware testified that Paul Ware had been physically, mentally and emotionally abusing her, and forcing his theories about why she did not need to pay taxes on her. After petitioner was convicted, she obtained a restraining order against him and commenced divorce proceedings. Petitioner testified at the sentencing hearing that Paul Ware forced her to read anti-tax literature and coerced her into not paying taxes. Paul Ware has allegedly never filed tax returns or paid taxes.

lawsuit to stop her employer from withholding income tax from her paychecks in violation of 26 U.S.C. § 7201. Counts three, four and five of the indictment alleged that in 2002, 2003 and 2004 Ware knew of a duty but willfully failed to file income tax returns in violation of 26 U.S.C. §7203.

Ware did not want a Florida Bar attorney, so a *Faretta* hearing took place on May 1, 2007. During that hearing, Ware repeatedly stated that although she wanted to represent herself[4], she also wanted the assistance of counsel to prepare her defense. During the colloquy with the magistrate, Ware stated that she did not understand the charges against her, she did not understand why this was being brought as a criminal matter, and she did not understand the difference between a civil and criminal matter. The magistrate did not discuss with petitioner the "nature of the charges," "the statutory offenses," or "possible defenses."

The Government stated that Ware was only equivocally waiving her right by stating that she wanted to represent herself but also wanted the assistance of counsel. The government argued that she should not be permitted to defend herself, and the court should order Ware to obtain an attorney.

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[4] Petitioner was of the mistaken belief that because the Florida Bar Foundation Charter is formed under Section 501(c)(3) of the Internal Revenue Code 1954, giving it tax exempt status, a conflict of interest existed by making all Florida Bar attorneys beholding to the IRS.

Nonetheless, the magistrate granted petitioner's request to proceed *pro se*.[5] (A-35).

During her opening statement, petitioner explained to the jury that she had not waived her right to counsel, and she was only before them without an attorney because the court would not permit her to have assistance from someone who is not a member of the Florida Bar. The district judge interrupted petitioner and called her to the bench where he indicated that he did not tell petitioner she had to have a lawyer who was a member of the Florida Bar, that she could have any attorney as long as they were admitted to practice in the Middle District. Petitioner replied that she did not recall him giving her that information.[6]

The evidence presented at trial established that Ware practiced pediatric dentistry with Dr. Harry Bopp in Florida. Ware acquired half of the practice and a forty percent interest in the partnership that owned the building. Ware filed tax returns up until 1999. In 2000, Ware informed Dr. Bopp that she no longer wanted federal income, Medicare, and Social

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[5] The Magistrate's order stated in a footnote that if either of the parties wanted to object to the order, they would need to do so within ten days. The order did not state that if a party failed to object within ten days they would waive their right to appeal.

[6] The record below does not indicate that petitioner was informed she could retain an attorney who was not a member of the Florida Bar.

Security taxes withheld from her paychecks. When Dr. Bopp refused, Ware explained to him that she did not believe that she was required to pay federal income tax, that there was no law requiring her to do so and she provided him with written materials supporting her theory.

In September 2000, two checking accounts at Bank of America were opened in the names of two unincorporated associations. Paul and Nancy Ware were the signatories on the account.[7] A few months later, Ware provided Dr. Bopp with different versions of W-4's that purported to exempt her from federal withholding requirements. However, Dr. Bopp refused to file these forms after verifying with the IRS that they were not authentic. Ware filed a W-4 form in 2001 and claimed that she was exempt from federal withholding. In May the Revenue Service notified the dental practice that Ware was not exempt and instructed the dental practice to withhold taxes from her paycheck. The Revenue Service sent Ware delinquency notices.

There was no evidence presented that the IRS ever performed an assessment or attempted to assess Ware. The government never requested any information from Ware. The government presented

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[7] Although the government accused Nancy Ware of opening these accounts, Nancy Ware disputed this and claimed that Paul Ware was the one who opened the accounts and he was the only one to make deposits and withdrawals from the account.

no evidence of the existence of a tax deficiency, although Special Agent James Cortier of the Revenue Service testified that he had analyzed Ware's financial records and "estimated" the amount of taxes she owed.

Although Ware previously filed Forms 1040, the government did not present any evidence that Ware had knowledge of the specific provision which imposed the legal duty alleged of filing a return. Ware testified on her behalf that she did not know of any law which imposed a legal duty on her Ware testified that "Title 26 is very difficult to understand and read and follow."

While instructing the jury, the district court stated that a § 7201 charge has only two elements.[8] The court instructed that in order to convict petitioner, the jury had to find:

> First: That the Defendant owed substantial income tax; and
> Second: That the Defendant knowingly and willfully attempted to evade or defeat such tax.

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[8] The district court stated that "the instructions given to the jury were basically standard instructions from the Eleventh Circuit."

The court also stated:

> The proof need not show the precise amount of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the Defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

The jury found petitioner guilty on all Counts.

The district court enhanced petitioner's sentence based upon facts not submitted to a jury. Specifically, the district court calculated Defendant's sentencing guideline offense level as 20 and criminal history category as I, for a guideline range of 33 to 41 months. The district court imposed the sentence of 33 months based upon the government's proposed tax loss figure as set forth in the presentence report. The amount of tax loss was never submitted to, nor found by the jury, as admitted by the government during sentencing.

Ware's counsel objected to the use of the tax figure in the presentence report, as it was not found by the jury and proved beyond a reasonable doubt. Petitioner's counsel stated that pursuant to *Booker*

and *Cunningham*, a jury should find beyond a reasonable doubt if the tax loss figure is correct "if that number is going to be used to enhance a penalty." Although the government admitted that the "issue as to the determination of the specific amount" was "not put to the jury," the government was of the opinion that it was not required.

The court overruled petitioner's objection and adopted the position of the government as set forth in the presentence report.

On appeal petitioner raised several issues, only three are relevant to this petition. First, petitioner argued that she did not knowingly and intelligently waive her Sixth Amendment right to counsel. Petitioner stated that the magistrate never discussed the "nature of the charges", the statutory offenses," or "possible defenses." Further, the charges were not discussed or explained, but merely summarized by the government. Petitioner maintained throughout the *Faretta* hearing that she needed the assistance of competent counsel who could help her prepare her defense. Further, during her opening statement at trial, petitioner again stated that she had not waived her right to counsel, but was not represented by an attorney because the court would not allow her to have an attorney who was not a member of the Florida bar.

Second, petitioner argued that district court erroneously instructed the jury that 26 U.S.C. § 7201 contains only two elements. Petitioner stated that

the Supreme Court has held that there are three elements to a § 7201 charge, 1) willfulness; 2) the existence of a tax deficiency; and 3) an affirmative act constituting an evasion or attempted evasion of the tax. *Sansone v. United States*, 380 U.S. 343, 351 (1965). Further, this circuit has held that there are three elements in a 7201 charge. *United States v. Kaiser*, 893 F.2d 1300, 1305 (11th Cir. 1990); *United States v. Williams*, 875 F.2d 846 (11th Cir. 1989); *United States v. Edwards*, 777 F.2d 644, 650 (11th Cir. 1985); *United States v. Stone*, 702 F.2d 1333, 1338 (11th Cir. 1983). By combining the actus reus with the mens rea, the court erroneously made the charge into a general intent crime, not a specific intent crime. *see Cheek v. U.S.*, 498 U.S. 192, 200 (1991) (Congress has made "specific intent to violate the law an element of certain federal criminal tax offenses"). Therefore, petitioner stated that the jury instruction was legally erroneous. Although the district court attempted to justify its instruction by stating, "[t]he instructions given to the jury were basically standard instructions from the Eleventh Circuit," the Eleventh Circuit Court of Appeals has ruled that "[a]lthough [the pattern jury instructions are] generally considered 'a valuable resource, reflecting the collective research of a panel of distinguished judges,' they are not binding: Eleventh Circuit case law takes precedence." *United States v. Dohan*, 508 F.3d 989, 994 (11th Cir. 2007) (citations omitted).

Lastly, petitioner argued that the district court violated her rights under the Sixth Amendment

when it calculated her sentence based on facts not alleged in the indictment or proved to the jury regarding the amount of tax loss to the government in violation of *Cunningham v. California* 549 U.S. 270 (2007), *United States v. Booker*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

III. ELEVENTH CIRCUIT OPINION

In an unpublished Per Curiam decision the Eleventh Circuit affirmed Ware's conviction and sentence. (A-3).

With regard to petitioner's argument that she did not validly waive her Sixth Amendment right to counsel, the Eleventh Circuit held that petitioner "waived this argument because she failed to object to the order of the magistrate judge that granted Ware's request to represent herself." *See* Fed. R. Crim P. 59 (a). (A-14). The panel concluded that they "lack[ed] jurisdiction to review that order." *United States v. Brown*, 441 F.3d 1330, 1352 (11th Cir. 2006). (A-14). The panel therefore declined to reach the merits of the right to counsel issue.

Next, the Eleventh Circuit held the district court did not err in its jury instructions. (A-16). The panel noted that the district court "correctly followed our pattern instructions, which 'clearly state the elements of proof required for conviction under [section7201]' and section 7203. *United States v.*

Dean, 487 F.3d 840, 852 (11th Cir. 2007). (A-16). The panel concluded that the instructions "accurately conveyed the law regarding tax evasion and willfulness." (A-16).

Finally, the Circuit held the district court had not erred at Ware's sentencing by calculating Petitioner's offense level based on the taxes she failed to pay in years 2000-2004. (A-17) The panel stated that "the amounts of the unpaid taxes were listed in the presentence investigation report. Because Ware did not object to them, these facts were admitted as true, and the district court could rely on them as supported by a preponderance of the evidence. *United States v. Shelton*, 400 F.3d 1325, 1329-30 (11th Cir. 2005)." (A-17). The panel concluded that the district court "viewed the guidelines as advisory and could use the findings to calculate Ware's sentence." (A-17).

STATEMENT OF LOWER COURT JURISDICTION UNDER RULE 14.1(g)(ii)

The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291. (A-43).

REASON FOR GRANTING THE WRIT

I.

The Eleventh Circuit has decided that a Circuit Court of Appeals lacks jurisdiction to review, on appeal after trial, an issue that was decided during a pretrial ruling made by a magistrate judge if the defendant fails to appeal that ruling to the District Court. This ruling is inconsistent with the other Circuits and this Court's holding in *Thomas v. Arn*, and violates a criminal defendant's statutory right to appeal his conviction under 28 U.S.C. 1291.

This petition presents an important and recurring question concerning the jurisdiction of a United States Court of Appeals to consider on appeal after trial an issue that was determined by a Magistrate judge and affirmed by the district court without further review.

The issue of whether a defendant may waive her rights to appeal by not objecting to the findings of a magistrate judge to the district court was before this Court in *Thomas v. Arn*, 474 U.S. 140 (1985). However, this issue was framed in the context of "[w]hether a court of appeals may exercise its supervisory powers to establish a rule that the failure to file objections to the magistrate's report waives the right to appeal the district court's judgment." *Thomas*, 474 U.S. at 142. The Court held that such a procedural rule is a valid exercise of the court's supervisory power, and that "it was not the

intent nor the practical effect of the court's waiver rule" to "restrict the court's own jurisdiction." *Id.* at 145-46. The Court noted that the First, Second, Fourth, and Fifth Circuits adopted waiver rules similar to the waiver rule at issue in *Thomas*. *see Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *McCarthy v. Manson*, 714 F.2d 234, 237 (2nd Cir. 1983); *United States v. Schronce*, 727 F.2d 91 (4th Cir.), *cert. denied*, 467 U.S. 1208 (1984); *United States v. Lewis*, 621 F.2d 1382, 1386 (5th Cir. 1980), *cert. denied*, 450 U.S. 935 (1981). The Ninth and Eleventh Circuits have concluded that the failure to file objections waives only factual issues on the appeal. *see Britt v. Simi Valey Unified School District*, 708 F.2d 452, 454 (9th Cir. 1983) (order denying petition for rehearing); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982) (en banc); *but see Lorin Corp v. Goto & Co.* 700 F.2d 1202, 1205-1207 (8th Cir. 1983) (rejecting waiver rule, at least where parties had not been notified that failure to object would waive appeal). *Thomas*, 474 U.S. at 142 n. 4. However, this Court specifically noted that "in none of these cases have the courts spoken in jurisdictional terms." *Ibid.* This Court also emphasized that "because the rule is a non-jurisdictional waiver provision, the Court of Appeals may excuse the default in the interests of justice." *Id.* at 155.

The jurisdictional issue came before this Court when it granted certiorari to review the Eleventh Circuit's decision[9] in *United States v. Brown*, 299 F3d 1252 (11th Cir. 2003). In opposing the petition, the Solicitor Attorney General stated in the government's brief:

> [T]he government agrees with the petitioner that the Eleventh Circuit's conclusion that it lacked jurisdiction is incorrect. The court of appeals explained that it lacked jurisdiction: '[a]ppeals from the magistrate's ruling must be to the district court.' (quoting *Renfro*, 620 F.2d. at 500). The appeal in this case, however, was not taken directly from the magistrate judge's order.

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[9] In *Brown*, one of the issues on appeal was from an order of the magistrate judge denying a pre-trial motion for the defendant's counsel to withdraw. The defendant failed to object or appeal the magistrate's decision to the district court. The Eleventh Circuit held that it lacked jurisdiction to review the magistrate judge's decision, relying on a former Fifth Circuit case, *United States v. Renfro*, 620 F2d 497, 500 (5th Cir. 1980)(holding that appeals from a magistrate's rulings must first be made to the district court for the appellate court to have jurisdiction).

> Rather, petitioner appealed from the final judgment of conviction entered by the district court in her case. See Pet. App. 42 ('Petitioner appeals her convictions'). The court of appeals had jurisdiction of that appeal pursuant to 28 U.S.C. 1291 (courts of appeals have jurisdiction of appeals from 'all final decisions of the district courts') . . . Once the court of appeals has jurisdiction, Federal Rule of Criminal Procedure 52(b) prescribes the standard for review of a claim that was not presented to the district court. That rule provides that '[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention . . . "

[Brief of the United States in *Brown v. United States*, U.S. No. 02-8263 at pages, 10-11].

The Court granted the petition for writ for certiorari, vacated the lower court's judgment and "remanded

[the case] to the United States Court of Appeals for the Eleventh Circuit for further reconsideration in light of the position taken by the Solicitor General in his brief for the United States filed April 4, 2003." *Brown v. United States*, 538 U.S. 1010 (2003).

On remand, the Eleventh Circuit reinstated their original opinion holding: "Upon reconsideration, the panel is of the view that under our circuit precedent we are bound by *Renfro*, unless and until it is overruled by this court en banc or by the Supreme Court." *United States v. Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003) *rehearing and rehearing en banc den., U.S. v. Brown*, 99 F.3d 888 (11th Cir. 2004), *cert. den., Brown v. U.S.*, 543 U.S. 823 (2004).

The Eleventh Circuit is still relying on *Renfro* and *Brown* and continues to erroneously deny defendants their right to appeal from final judgment under 28 U.S.C. § 1291 on the basis of lack of jurisdiction.

In *Renfro*, the defendant presented a discovery motion to a federal magistrate judge prior to his trial for assaulting an FBI agent. 620 F.2d at 499. After a full hearing on the issue, the magistrate judge denied the defendant's motion. *Id.* at 500. The defendant did not appeal this order to the district court until after the trial was complete. *Ibid.* The Fifth Circuit Court of Appeals held that because the defendant did not appeal the magistrate's ruling to the district court until after trial, he was "in essence . . . appealing a magistrate's decision directly to this Court." *Ibid.* The court concluded: "The law is

settled that appellate courts are without jurisdiction to hear appeals directly from federal magistrates." *Ibid.* citing, *United States v. Cline*, 566 F.2d 1220, 1221 (5th Cir. 1978); *United States v. Haley*, 541 F.2d 678 (8th Cir. 1974). Therefore, the court dismissed this part of the defendant's appeal.

Although both *Cline* and *Haley* hold that appellate courts are without jurisdiction to hear appeals directly from federal magistrates, in those cases, unlike in *Renfro*, *Brown*, and the present matter, the defendants tried to appeal the magistrates' orders directly to the appellate division without first having a trial at the district court level. In this matter, petitioner is not appealing from the Magistrate's order, but rather is appealing from the final judgment of the district court. A Circuit Court of Appeals certainly has jurisdiction under 28 U.S.C. §1291 to hear an appeal from final judgment by the district court.

The panel below also erroneously relied on F.R.C.R.P. 59(a) in its finding that it lacked jurisdiction to consider petitioner's argument about waiver of counsel. That section is a rule of procedure, and speaks to preserving the right to appeal by filing an objection to the magistrate's order to the district judge within a certain time frame. It does not speak to jurisdiction or appeals from final judgment. (See Appendix F).

In this matter, the district court could have required petitioner to obtain an attorney when it became

evident that petitioner did not understand that she had waived her right to counsel during her oral statement. The district court took no action and petitioner is appealing from the final judgment of that district court.

Resolution of this issue demands the attention of this Court, given the adverse and unfair consequences of the continued erroneous decisions of the court below. The petition for a writ of certiorari should be granted.

II.

The Eleventh Circuit's affirmation of the sentencing court's procedures at sentencing is in conflict with a prior decision of this Court. The sentencing court improperly enhanced petitioner's sentencing Guideline range based upon facts not submitted to a jury or admitted by the defendant.

This Court has consistently held, "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham*, 549 U.S. at 272-73 (2007); *see also Booker*, 543 U.S. 220; *Blakely*, 542 U.S. 296; *Apprendi*, 530 U.S. at 476. The Court's "bright line rule" is: "Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Cunningham*, 542 U.S. at 270; citing *Apprendi*, 530 U.S. at 490. As the Court has repeatedly stated, "The relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303-304. (emphasis in original).

In this matter, Ware was sentenced under the Federal Sentencing Guidelines. The amount of tax loss was not found by a jury. The facts found by the jury yielded a base Guidelines range of 0 to 6 months'

imprisonment, a range the judge could not exceed without undertaking additional factfinding. *see* U.S.S.G. § 2T1.1(a)(2). (A-44). Rather than finding within this guideline range, the district court made an upward departure by accepting the government's proposed tax loss, over the objection of petitioner, thus boosting Ware into a higher Guidelines Range.

The Eleventh Circuit Court of Appeals stated that the district court did not err by calculating Ware's offense level because "the district court viewed the guidelines as advisory and could use the findings to calculate Ware's sentence." (A-17).

Although under *Booker*, the Sentencing Guidelines are an advisory rather than a mandatory regime, the district court still remains obliged to " consult" and " take into account" the Guidelines in sentencing. *Booker*, 543 U.S. at 260. After *Booker*, "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." Id. at 264.

This consultation requirement, at a minimum, obliges the district court to calculate correctly the sentencing range prescribed by the Guidelines:

> After *Booker*, the Federal Sentencing Guidelines remain an essential consideration in the imposition of federal sentences, albeit along

> with the factors in §3553(a). A sentencing court under *Booker* still must consider the Guidelines, and, such consideration necessarily requires the sentencing court to calculate the Guidelines sentencing range in the same manner as before *Booker*.

United States v. Shelton, 400 F.3d 1325, 1332 n. 9 (11th Cir. 2005).

In other words, as was the case before *Booker*, the district court must calculate the Guidelines range accurately. A district court's misinterpretation of the Guidelines "effectively means that [the district court] has not properly consulted the Guidelines ...." *United States v. Hazelwood*, 398 F.3d 792, 801 (6th Cir. 2005).

In choosing the correct guidelines range, the court must abide by *Apprendi*, and only use those facts that were found by a jury beyond a reasonable doubt. Therefore, by calculating petitioner's sentencing range based on facts not submitted to or found by a jury, and affirming the district court's decision, the district court and Eleventh Circuit Court of Appeals violated petitioner's Sixth Amendment rights and her sentence must be reversed.

III.

The Eleventh Circuit uses pattern jury instructions for a 26 U.S.C. § 7201 charge which erroneously instruct the jury to find two elements, in conflict with other circuits and this Court which hold that a § 7201 charge has three elements.

The Sixth Amendment to the Constitution of the United States guarantees every citizen in a criminal prosecution that he "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." (A-41). The right is preserved by giving jury instructions that adequately inform the jury as to the nature of the crime and the elements the government must prove beyond a reasonable doubt before a defendant may be found guilty as charged.

An instruction must not relieve the government of its burden of proving each and every element of an offense. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). "A district court's failure to submit an element of the offense to the jury . . . is a structural error which defies the harmless-error analysis." *United States v. Hanson*, 262 F.3d 1217 (11th Cir. 2001); citing *Johnson v. United States*, 520 U.S. 461, 468-469 (1997). There must be "no tendency to confuse or mislead the jury with respect to the applicable principles of law." *Gulf Life Ins. Co. v. Folsom*, 907 F.2d 1115, 1121 (11th Cir. 1990).

Ware was charged with five felony counts. Two were for violations of 26 U.S.C. § 7201, evasion of income taxes. Section 7201 states in pertinent part, "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, ... be guilty of a felony.

In *Sansone v. United States*, 380 U.S. 343, 351 (1965), this Court held that a crime under 26 U.S.C. § 7201 has three essential elements. ("the elements of a § 7201 are will-fulness (sic); the existence of a tax deficiency; and an affirmative act constituting an evasion or attempted evasion of the tax.)(internal citations omitted).
All the other circuits, *including*, the Eleventh Circuit have accepted as authoritative these three elements, *see United States v. Hunerlack*, 197 F.3d 1059 (11th Cir. 1999); *United States v. Kaiser*, 893 F.2d 1300 (11th Cir. 1990) and *United States v. Edwards*, 777 F.2d 644 (11th Cir. 1985).

Although the Eleventh Circuit recognizes that there are three elements in a § 7201 charge, the district court in this matter instructed the jury on only two elements. The pertinent jury instructions related to the charge of income tax evasion were as follows:

> Section 7201 of the Internal Revenue Code (26 U.S.C. § 7201) makes it a Federal crime or offense for anyone to willfully attempt to evade or defeat the

> payment of federal income taxes.
> The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:
>
> *First:* That the Defendant owed substantial income tax in addition to that declared in his tax return; and
>
> *Second:* That the Defendant knowingly and willfully attempted to evade or defeat such tax.

Although the court did instruct the jury that "willfully" "means a voluntary, intentional violation of a known legal duty," the court did not instruct them to find that it was an element of the crime the jury had to find.

By instructing the jury as to only two elements, the court combined the actus reus with the mens rea, committing clear error and making the charges into general intent crimes. This Court held that tax crimes are "specific intent crimes." *see Cheek v. United States*, 498 U.S. 192, 200 (1991) (Congress has made "specific intent to violate the law an element of certain federal criminal tax offenses").

Where the "mens rea and actus reus appear in the text of the statute as two separate, distinct elements, both [of the elements] must be proven." *United States v. Dollar Money Market Account, et al.*, 980 F.2d 233, 237 (3rd Cir. 1992). Section 7201 clearly states, "Any person who willfully [mens rea] attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof [actus reus]."

Further, this Court established in *Sansone*, that the different elements require different facts to prove the elements. The affirmative act, the actus reus, requires some affirmative step. *Sansone*, 380 U.S. at 351-52. Section 7201 encompasses two kinds of affirmative behavior: the evasion of assessment and the evasion of payment. *see e.g., Id.* at 354; *United States v. Carlson*, 235 F.3d 466, 467 (9th Cir. 2000). The mens rea element, willfulness, "requires proof of an intentional violation of a known legal duty," the government must prove "specific intent" to commit the crime. *United States v. Williams*, 121 F.3d 615, 621 (11th Cir. 1997). This "mental state" with "specific intent" "imports a bad purpose or evil motive." *Id.* citing *United States v. Bishop*, 412 U.S. 346, 361 (1973).

Because the Eleventh Circuit's pattern jury instructions which instruct a jury to find only two elements in a 26 U.S.C. § 7201 charge is in conflict the decisions in the other circuits, its own Circuit, and this Court, certiorari should be granted to resolve the issue.

CONCLUSION

For the foregoing reasons, petitioner NANCY MONTGOMERY-WARE prays that this Court grant her petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit affirming her conviction for tax evasion and related offenses.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-14239

[DATE STAMP]
FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 10 2008
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

NANCY MONTGOMERY WARE,
Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: MARCUS, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

The petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ _____
UNITED STATES CIRCUIT JUDGE

CThis case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Nancy Montgomery WARE, Defendant-Appellant.

No. 07-14239

Non-Argument Calendar.

Sept. 11, 2008.

Background: Defendant was convicted in the United States District Court for the Middle District of Florida of tax evasion and failing to file a tax return. Defendant appealed.

Holdings: The Court of Appeals held that:

(1) indictment sufficiently alleged defendant's tax crimes;

(2) defendant waived her argument that she did not knowingly and intelligently waive her right to trial counsel;

(3) sufficient evidence supported defendant's convictions; and

(4) district court did not plainly err by defendant's offense level under the Sentencing Guidelines based on taxes defendant failed to pay.

Affirmed.

West Headnotes

[1] Internal Revenue 220 ⊶5286

220 Internal Revenue
220XXXII Offenses
220XXXII(B) Criminal Prosecution
220k5282 Indictment and Information
220k5286 k. Failure to Make Returns, False Returns and Evasion of Tax. Most Cited Cases
Indictment sufficiently alleged defendant's tax crimes of willfully attempting to evade and defeat an income tax and willfully failing to file an income tax return, as the indictment contained all the elements of the crimes.

[2] United States Magistrates 394 ⊶31

394 United States Magistrates
394k31 k. Further Review; Direct Appeal. Most Cited Cases
Defendant waived her argument that she did not knowingly and intelligently waive her right to trial counsel by failing to object to order of magistrate judge granting defendant's request to represent herself.

[3] Internal Revenue 220 ⊶5300

220 Internal Revenue
220XXXII Offenses
220XXXII(B) Criminal Prosecution

220k5297 Evasion of Taxes, Weight and Sufficiency

220k5300 k. Motive, Intent, and Willfulness. Most Cited Cases

Internal Revenue 220 ⚿5301

220 Internal Revenue
220XXXII Offenses
220XXXII(B) Criminal Prosecution
220k5297 Evasion of Taxes, Weight and Sufficiency

220k5301 k. Failure to File Return. Most Cited Cases

Sufficient evidence supported defendant's convictions for willfully attempting to evade and defeat an income tax and willfully failing to file an income tax return; after defendant paid income taxes for two years, defendant intentionally evaded the payment of taxes by providing her employer with fraudulent tax forms, instructing him to stop withholding taxes, depositing her earnings in nominee bank accounts, conducting surreptitious cash transactions, and failing to file tax returns or pay taxes, and defendant received notice from the Internal Revenue Service (IRS) that she had failed to pay sufficient taxes for two years and did not file returns for three other years.

[4] Sentencing and Punishment 350H ⚿300

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(E) Presentence Report
350Hk300 k. Use and Effect of Report.

Most Cited Cases

District court did not plainly err by calculating offense level of defendant convicted of willfully attempting to evade and defeat an income tax and willfully failing to file an income tax return under the Sentencing Guidelines based on the taxes defendant failed to pay; the amounts of unpaid taxes were listed in the presentence investigation report, and defendant did not object to them. U.S.S.G. § 2T4.1(G), 18 U.S.C.A.

*846 Nancy Montgomery Ware, Lakeland, FL, pro se.

Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 07-00105-CR-T-30-EAJ.

Before MARCUS, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

**1 Nancy Montgomery Ware appeals her convictions and sentences for two counts of willfully attempting to evade and defeat an income tax, 26 U.S.C. § 7201, and three counts of willfully failing to file an income tax return, *id.* § 7203. Ware challenges jury instructions, the sufficiency of her indictment and the evidence, her waiver of counsel, and the calculation of her tax liability and restitution. We affirm.

I. BACKGROUND

Ware was indicted for attempting to evade and defeat taxes and failing to file *847 income tax

returns. The first count of the indictment charged that Ware owed taxes of $126,664 in 2000 and willfully attempted to avoid payment by filing a W4 form stating that she was exempt from withholding; placing her income in nominee bank accounts; and failing to file a tax return or pay the income tax. *See* 26 U.S.C. § 7201. The second count of the indictment charged Ware for the willful attempt to avoid payment in 2001 of $33,483 of income taxes through the same actions alleged in count one and by instituting a frivolous lawsuit to stop her employer from withholding income tax from her paychecks. *See id.* Counts three, four, and five of the indictment charged that in 2002, 2003, and 2004, Ware knew of a duty but willfully failed to file income tax returns. *See id.* § 7203.

Before trial, Ware informed the magistrate judge that she did not want to be represented by counsel. The magistrate judge conducted a colloquy under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), in which Ware stated that she "absolutely" wanted to represent herself. The district court appointed standby counsel.

Ware moved to dismiss her indictment. She argued that the indictment "failed to identify the essential facts of law or regulation the government claims as grounds to charge and enforce title 26 U.S.C. section 7201 and 7203." The district court denied the motion.

Ware represented herself at her jury trial and was convicted on all five counts of the indictment. The evidence established that Ware practiced pediatric

dentistry with Dr. Harry Bopp in Florida. Ware acquired half of the practice and a forty percent interest in the partnership that owned the building. Ware filed tax returns in 1998 and in 1999. In 2000, Ware informed Dr. Bopp that she no longer wanted federal income, Medicare, and Social Security taxes withheld from her paychecks. When Dr. Bopp refused, Ware gave him written materials about tax avoidance and arranged for him to meet two "tax-escape" advisors. While Ware tried to convince Dr. Bopp, the dental practice extended Ware "loans" equaling her gross earnings.

In September 2000, Ware opened two checking accounts at the Bank of America in the names of two unincorporated associations. A few months later, Ware gave Dr. Bopp fraudulent tax forms that purported to exempt her from federal withholding requirements. After Dr. Bopp refused to file Ware's fraudulent tax forms, Ware completed a W-4 form certifying that she was "exempt" from withholding. In the meantime, Ware had corresponded with the Internal Revenue Service about her tax liability. The Revenue Service told Ware that "courts [had] consistently ruled against" her arguments for exemption and refused to "respond to future correspondence concerning these issues."

**2 Ware filed a complaint against Dr. Bopp in a Florida court. Ware alleged that the federal income payroll deductions withheld by Dr. Bopp constituted "theft." Dr. Bopp removed the case to a federal court, which dismissed the complaint.

Ware filed another W-4 form in 2001 and claimed

that she was "exempt" from federal withholding. In May, the Revenue Service notified the dental practice that Ware was not exempt and instructed the dental practice to withhold taxes from her paycheck. The Revenue Service sent Ware delinquency notices. The notices instructed Ware to either file tax returns for 2000 and 2001 or explain why she was not obligated to file a return for these years. Ware did not respond to the notices.

*848 Ware filed a second complaint in 2002 against Dr. Bopp and repeated her allegations of "theft." Dr. Bopp removed the action to a federal court, which dismissed the complaint. Ware did not file a tax return in 2002.

Ware sued Dr. Bopp a third time in 2003. While the action was pending, Ware returned a paycheck and bonus issued by the dental practice and endorsed a check from the partnership account to herself that equaled her gross earnings. Dr. Bopp removed the action to federal court. The district court described Ware's complaint as "baseless, vexatious, and in bad faith," dismissed the complaint, and enjoined Ware from filing future complaints against Dr. Bopp without approval. Ware did not file a tax return in 2003 or 2004.

In 2007, Ware executed and filed a "Declaration of Domicile." The document stated that Ware was "domiciled" in and a citizen of Florida and disavowed that Ware was a "resident" of Florida, a "U.S. Citizen," a "U.S. person," or a "U.S. subject." Ware later argued that the document exempted her from federal law, including federal income tax.

At trial, special agent James Cortier of the Revenue Service testified that he had analyzed Ware's financial records and estimated that Ware owed an additional $126,664.07 for taxes in 2000 and $33,482.70 for taxes in 2001. Ware argued that federal income taxes were "voluntary" and she was not legally obligated to pay. Ware acknowledged the existence of the tax code on cross-examination, but argued that its provisions were unenforceable because they did not "rise to positive law." Ware also acknowledged that the Revenue Service and federal courts had advised her that her arguments were frivolous.

Before the district court instructed the jury, Ware objected that the proposed charges erroneously expanded the definition of what constituted income under section 7201, which the court overruled. The district court followed the pattern criminal jury instructions to define "willfully" as "a voluntary and intentional violation of a known legal duty." The court explained that to convict Ware of section 7201 the jury had to find beyond a reasonable doubt that Ware owed substantial income tax and knowingly and willfully attempted to evade or defeat such tax. The court also explained that the evidence did not have to establish the precise amount of tax alleged in the indictment but had to establish that Ware knowingly and willfully attempted to evade or defeat "some substantial portion of such additional tax as charged" by willfully failing to report all of her earned income for the year. Regarding section 7203, the court explained that Ware's conduct was not willful if it was "based upon accident, mistake,

inadvertence, or due to a good-faith misunderstanding as to the requirements of the law" or if Ware "believe[d] in good faith that she [was] acting within the law or that her actions compl[ied] with the law."

**3 The presentence investigation report stated that Ware owed the Revenue Service a total of $362,212.24. The report listed Ware's base offense level at 18, United States Sentencing Guidelines § 2T4.1(G) (Nov.2003), and increased it by two levels because the crime involved a sophisticated means, *id.* § 2T1.1(b)(2). With a criminal history category of I, the report provided a sentencing range between 33 and 41 months of imprisonment.

At the sentencing hearing, Ware did not object to the factual statements in the presentence report. Ware confirmed that she already had paid the full amount of restitution listed in the report. The district court sentenced Ware to concurrent terms of 33 months of imprisonment followed by supervised release of 3 years for *849 counts 1 and 2 of the indictment, and 12 months of imprisonment followed by supervised release of 1 year on counts 3, 4, and 5 of the indictment.

II. STANDARDS OF REVIEW

We apply three standards of review in this appeal. We review *de novo* the sufficiency of an indictment, *United States v. Bobo*, 344 F.3d 1076, 1082-83 (11th Cir.2003), but review arguments raised for the first time on appeal for plain error, *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir.2005). We

review challenges to the sufficiency of the evidence and the jury instructions raised for the first time on appeal for plain error. *See United States v. Hunerlach*, 197 F.3d 1059, 1068 (11th Cir.1999); *United States v. Hansen*, 262 F.3d 1217, 1248 (11th Cir.2001). We review *de novo* questions of law arising under the Sentencing Guidelines, *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir.2005), but reverse for plain error where the defendant raises the argument for the first time on appeal, *Rodriguez*, 398 F.3d at 1298. We will not consider error invited by the complaining party. *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir.2006).

III. DISCUSSION

Ware raises five arguments on appeal. All fail. We address each argument in turn.

A. Ware's Indictment Was Sufficient.

[1] Ware raises for the first time on appeal two challenges to the sufficiency of her indictment. First, Ware argues that her indictment failed to allege that she acted with specific intent to commit the five tax crimes. Second, Ware argues that the government should have alleged that the Revenue Service had assessed the taxes that she owed, given her notice, and demanded payment.

Ware's two arguments about the sufficiency of her indictment fail. When the adequacy of an indictment is challenged for the first time on appeal, this Court " 'must find the indictment sufficient unless it is so defective that it does not, by any reasonable

construction, charge an offense for which the defendant is convicted.' " *United States v. Adams*, 83 F.3d 1371, 1375 (11th Cir.1996) (quoting *United States v. Hooshmand*, 931 F.2d 725, 734-35 (11th Cir.1991)). The indictments sufficiently notified Ware of the mens rea component of her tax crimes because the term "willfully," used in the tax laws, means a " 'voluntary, intentional violation of a known legal duty.' " *Cheek v. United States*, 498 U.S. 192, 201, 111 S.Ct. 604, 610, 112 L.Ed.2d 617 (1991). An assessment and notice of a tax deficiency are not elements of tax evasion and the government was not required to allege them in Ware's indictment. *See* 26 U.S.C. § 7201.

**4 The indictments sufficiently alleged Ware's tax crimes. "[F]or an indictment to be valid, it must 'contain the elements of the offense intended to be charged, and sufficiently apprise the defendant of what [she] must be prepared to meet.' " *U.S. v. Bobo*, 344 F.3d 1076, 1083 (11th Cir.2003) (quoting *Russell v. United States*, 369 U.S. 749, 763, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962)). Counts 1 and 2 alleged the elements of tax evasion and Counts 3 through 5 alleged the elements of failing to file a tax return.

B. We Lack Jurisdiction to Consider Ware's Argument About Waiver of Counsel.

[2] Ware argues that she did not knowingly and intelligently waive her right to trial counsel, but this argument fails. Ware waived this argument because she *850 failed to object to the order of the magistrate judge that granted Ware's request to

represent herself. *See* Fed.R.Crim.P. 59(a). We lack jurisdiction to review that order. *United States v. Brown*, 441 F.3d 1330, 1352 (11th Cir.2006).

C. Sufficient Evidence Supports Ware's Convictions.

[3] Ware presents two arguments for the first time on appeal that the government presented insufficient evidence to support her convictions. First, Ware argues that the government was required to prove that the Revenue Service made an assessment, showed that a deficiency existed, and gave her notice and demanded payment. Second, Ware argues that the government failed to prove the element of willfulness because it did not establish that Ware was aware that a statute or regulation imposed a duty to file a return.

Ware's arguments fail. The district court did not err by failing to grant *sua sponte* a judgment of acquittal. When a defendant fails to move for a judgment of acquittal, we will affirm her conviction "unless there is a manifest miscarriage of justice if the evidence 'on a key element of the offense is so tenuous that a conviction would be shocking.' " *United States v. Bichsel*, 156 F.3d 1148, 1150 (11th Cir.1998) (quoting *United States v. Williams*, 144 F.3d 1397, 1402 (11th Cir.1998)).

The government proved that Ware knew and intentionally avoided her tax obligations. After Ware paid income taxes in 1998 and 1999, Ware intentionally evaded the payment of taxes by providing her employer with fraudulent tax forms; instructing him to stop withholding taxes; depositing

her earnings in nominee bank accounts; conducting surreptitious cash transactions; and failing to file tax returns or pay taxes. Ware received notice from the Revenue Service that she had failed to pay sufficient taxes in 2000 and 2001 and did not file returns in 2002, 2003, and 2004. Ware ignored these obligations despite rulings of a federal court and the Revenue Service that she was subject to and accountable for the taxes. The government was not required to prove that the Revenue Service had assessed the tax owing or demanded payment because the tax code does not require those acts to precede the filing of a tax return or payment of income taxes. *See* 26 U.S.C. § 6151(a). Special Agent Cortier's testimony established that Ware owed an additional $126,664.07 for federal income taxes in 2000 and $33,482.70 for taxes in 2001, and Ware's testimony denying guilt, which the jury discredited, under our precedents, established her guilt. *United States v. Williams*, 390 F.3d 1319, 1326 (11th Cir.2004). Because the government proved that Ware was aware of her duty to file income tax returns and treat her wages as income, it was not required to prove Ware's knowledge that a specific statute or regulation imposed those duties. *Cheek*, 498 U.S. at 202, 111 S.Ct. at 610 ("[I]f the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement.").

D. The District Court Did Not Plainly Err in its Jury Instructions.

**5 Ware raises on appeal two new challenges to the jury instructions. First, Ware argues that the court

erroneously combined the affirmative act and willfulness components of section 7201. Second, Ware argues that the jury instruction about willfulness did not convey that Ware's tax offenses were specific intent crimes and did not specify the provisions that required her to file tax returns and pay taxes. These arguments fail.

*851 The district court did not plainly err in its jury instructions. The court correctly followed our pattern jury instructions, which "clearly state the elements of proof required for conviction under [section 7201]" and section 7203. *United States v. Dean*, 487 F.3d 840, 852 (11th Cir.2007). The instructions accurately conveyed the law regarding tax evasion and willfulness. *See* 11th Cir. Pattern Crim. Jury Instr. 93.1, 94; *Cheek*, 498 U.S. at 202, 111 S.Ct. at 610.

E. The District Court Did Not Plainly Err At Sentencing.

Ware presents two challenge to her sentence. First, Ware argues that the district court violated her rights under the Sixth Amendment when it calculated her sentence based on facts not alleged in the indictment or proved to the jury regarding the amount of tax loss to the government. Second, Ware argues that the district court should not have ordered restitution because the Revenue Service is not a "victim." These arguments fail.

[4] The district court did not plainly err by calculating Ware's offense level based on the taxes Ware failed to pay in years 2000 through 2004. *See* U.S.S.G. § 2T4.1(G). The amounts of the unpaid

taxes were listed in the presentence investigation report. Because Ware did not object to them, these facts were admitted as true, and the district court could rely on them as supported by a preponderance of the evidence. *See* *United States v. Shelton*, 400 F.3d 1325, 1329-30 (11th Cir.2005). The district court viewed the guidelines as advisory and could use the findings to calculate Ware's sentence. *See* *Dean*, 487 F.3d at 854.

Ware is barred from challenging the amount of restitution. Ware paid the Revenue Service the full amount of restitution before sentencing. Any error is invited. *Love*, 449 F.3d at 1157.

IV. CONCLUSION

Ware's convictions and sentences for tax evasion and failing to file a tax return are AFFIRMED.

C.A.11 (Fla.),2008.
U.S. v. Ware
292 Fed.Appx. 845, 2008 WL 4173845 (C.A.11 (Fla.)), 102 A.F.T.R.2d 2008-6149, 2008-2 USTC P 50,550

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

V. Case No. 8:07-cr-105-T-30EAJ

NANCY MONTGOMERY WARE

_____/

ORDER

THIS CAUSE comes before the Court upon Defendant's Motion to Reconsider Release and to State its Reasoning with Particularity (Dkt. #123). Defendant contends that the Court failed to specifically address any of the seven grounds she raised in her earlier Motion (Dkt. # 118). To the contrary, this Court specifically stated that Defendant's arguments, though eloquent, did not raise a substantial question of law or fact likely to result in reversal. The instructions given to the jury were basically standard instructions from the Eleventh Circuti and Defendant's other arguments were likewise without merit. Her argument that she did not knowingly and intelligently waive her right to counsel is absurd given the number of times she was represented, even entreated, by more than one judge to get a lawyer. And, her attempt to raise an

Apprendi/Booker argument about fact finding at sentencing is to no avail since all facts used at sentencing were admitted by her. See United States v. Shelton, 400 F.3d 1325 (11th Cir. 2005).

It is therefore ORDERED AND ADJUDGED that:

1. Defendant's Motion to Reconsider Release and to State its Reasoning with Particularity (Dkt. #123) is DENIED.

DONE and ORDERED in Tampa, Florida on April 15, 2008.

/S/ James S. Moody, Jr.
JAMES S. MOODY JR.
UNITED STATES
DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record
United States Probation Office

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

NANCY MONTGOMERY WARE

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 8:07-cr-105-T-30EAJ
USM NUMBER: 49360-018
Defendant's Attorney: Patrick Doherty, ret.

THE DEFENDANT:

__ pleaded guilty to count(s).
__ pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on count(s) ONE, TWO, THREE, FOUR and FIVE of the Indictment after a plea of not guilty.

TITLE & SECTION	NATURE OF OFFENSE
26 U.S.C. §7201	Willfully Attempting to Evade or Defeat Tax
26 U.S.C. §7201	Willfully Attempting to Evade or Defeat Tax

26 U.S.C. §7203	Willfully Failing to File an Income Tax Return
26 U.S.C. §7203	Willfully Failing to File an Income Tax Return
26 U.S.C. §7203	Willfully Failing to File an Income Tax Return

[table cont'd.]

OFFENSE ENDED	COUNT
April 16, 2001	One
April 15, 2002	Two
2002	Three
2003	Four
2004	Five

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_ The defendant has been found not guilty on count(s)

_ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant

must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material change in economic circumstances,

Date of Imposition of Sentence: December 6, 2007

/s/
JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

DATE: December 7, 2007

IMPRISONMENT

After considering the advisory sentencing guidelines and all of the factors identified in Title 18 U.S.C. §§ 3553(a)(I)-(7), the court finds that the sentence imposed is sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing.

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of THIRTY-THREE (33) MONTHS (total). This term consists of terms of THIRTY-THREE (33) MONTHS on each of Counts One and Two and terms of TWELVE (12) MONTHS on each of Counts Three, Four, and Five, all such terms to run concurrently.

_X_ The court makes the following recommendations to the Bureau of Prisons: The defendant shall be placed at FCI Coleman (FL), if possible.

__ The defendant is remanded to the custody of the United States Marshal.

__ The defendant shall surrender to the United States Marshal for this district.

at __ a.m./p.m. on __.
__ as notified by the United States Marshal.

__ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

__ before 2 p.m. on __.
X as notified by the United States Marshal.
__ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:
Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS. This term consists of a THREE (3) YEAR term as to each of Counts One and Two and a ONE (1) YEAR term as to Counts Three, Four, and Five, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime. The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

X The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution it is a condition of supervised release that the

defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in

residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity und shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

X The defendant shall participate as directed in a program of mental health treatment (outpatient and/or inpatient) and follow te probation officer's instructions regarding the implementation of this court directive. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable to by Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Mental Health Treatment Services.

X The defendant shall provide the probation officer access to any requested financial as long as there is any fine amount not paid.

X The mandatory drug testing provisions pursuant to the Violent Crime Control Act are waived. However, the Court orders the probation officer to conduct random drug testing not to exceed 104 tests per year.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Total Restitution
Totals:	$275.00	$25,000	$362,212.24 (already paid at the time of sentencing)

__ The determination of restitution is deferred until __ . *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

__ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Internal Revenue Service MPU Stop 151, Restitution P.O. Box 47-421 Doraville. GA 30362		$362,212.24 (already paid at the time of sentencing)	
Totals:	$___	$362.212.24 (already paid at the time of sentencing)	

* Findings for the total amount of losses are required under Chapters 109A 110, 110A, and 113A of Title 18 for the offenses committed on or after September 13, 1994, but before April 23, 1996.

__ Restitution amount ordered pursuant to plea agreement $ ___.

__ The defendant must pay interest on a fine or restitution of more than $2,500. unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment. pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

__ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

__ the interest requirement is waived for the __ fine __ restitution.

__ the interest requirement for the __ fine __ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. X Lump sum payment of $ 275.00 (special assessment)is due immediately, balance due __ not later than __, or

__ in accordance __ C, __ D, __ E or __ F below: or

B. __ Payment to begin immediately (may be combined with __ C, __ D, or __ F below); or

C. __ Payment in equal ___ (e.g., weekly, monthly, quarterly) installments of $___ over a period of ___, (e.g., months or years), to commence __ (e.g., 30 or 60 days) after the date of this judgment; or

D. __ Payment in equal ___ (e.g., weekly, monthly, quarterly) installments of $___ over a period of ___, (e.g., months or years), to commence __ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. __ Payment during the term of supervised

release will commence within ___ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time, or

F. X Special instructions regarding the payment of criminal monetary penalties:

The defendant is ordered to pay the $25,000 fine within one (1) year after the defendant's release from prison/incarceration.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

__ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

__ The defendant shall pay the cost of prosecution.

_ The defendant shall pay the following court cost(s):

_ The defendant shall forfeit the defendant's interest in the following property to the United States:

The Court orders that the defendant forfeit to the United States immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture, which are in the possession or control of the defendant or the defendant's nominees.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 8:07-CR-105-T-30EAJ

NANCY MONTGOMERY WARE,

Defendant.

_____/

ORDER

THIS CAUSE comes on consideration of Defendant's assertion of her right to proceed pro se in this case and waive her Sixth Amendment right to counsel. A hearing was held at arraignment on May 1, 2007 pursuant to Faretta v. California, 422 U.S. 806 (1975) and Fitzpatrick v Wainwright, 800 F.2d 1070 (11th Cir. 1986) to determine whether Defendant has knowingly and voluntarily waived her right to counsel, including her right to appointed counsel.

To determine whether a defendant has validly waived her right to counsel, the court "should explain the difficulties inherent in any criminal trial," explain the importance of the rules of evidence, and

inform the defendant of the charges, including offenses, and the possible range of punishment. United States v. Cash, 47 F.3d 1080, 1088 (11th Cir 1995) (citations omitted). However, the defendant's understanding of her rights, rather than the court's explicit advice ultimately determines whether there has been a valid waiver. Id. The court considers the following factors enumerated in Fitzpatrick to determine whether a valid waiver is knowing, voluntary and intelligent: (1) the age, educational background, and physical and mental health of the defendant; (2) the extent of the defendant's contact with counsel before trial; (3) the defendant's knowledge of the nature of the charges, potential defenses, and penalties; (4) the defendant's understanding of rules of procedure, evidence, and courtroom decorum; (5) the defendant's experience in criminal trials; (6) whether stand-by counsel was appointed and the extent to which that counsel aided the defendant; (7) any mistreatment or coercion of the defendant; and (8) whether the defendant was trying to manipulate the events of the trial. Fitzpatrick, 800 F.2d at 1065-67; see also Cash, 47 F.3d at 1088-89.

At the hearing, Defendant first stated that she would like her husband to represent her but did not offer any legal authority that would permit a non-lawyer to represent a criminal defendant before this court. Upon questioning by the court, Defendant averred that she intends to represent herself in this matter. Although Defendant also stated that she desires the assistance of counsel to help her prepare her case, Defendant maintained that she would not accept assistance of counsel from any attorney with a

Florida Bar number. Likewise, Defendant declined to submit a financial affidavit to determine whether she is eligible for court-appointed counsel.

Based upon the inquiry made at the hearing, I find that Defendant is competent to make the decision to waive her right to counsel, realizes the hazards of self-representation, and has voluntarily elected to waive her Sixth Amendment right to counsel.[1] See Faretta, 422 U.S. at 835; Fitzpatrick, 800 F.2d at 1065-67 (discussing the various factors to be considered in determining the validity of waiver of right to counsel). Because Defendant refuses to accept the assistance of any counsel with a Florida Bar number, there is no need to inquire into Defendant's financial eligibility for court-appointed counsel beyond her refusal to submit a financial

---

[1] Defendant appears to be in good physical and mental health and holds a doctorate in dentistry. Although Defendant stated that she did not understand the charges against her, she testified that she has had previous involvement in the legal system and contact with counsel in civil matters. Additionally, Defendant has purchased copies of the Federal Rules of Evidence and Federal Rules of Criminal Procedure and is aware that she will be required to follow them, although she has no knowledge per se, of their operation in a courtroom setting. Further, Defendant specifically testified that she had not been mistreated or coerced into waiving her right to counsel. Finally, there is no indication that Defendant is trying to manipulate the events of the trial. The undersigned strongly advised Defendant that it was in Defendant's best interest to retain or seek court-appointed counsel. The only factor the court was unable to evaluate is the appointment of stand-by counsel, as this factor is not applicable at this state of the proceedings.

affidavit.[2] Cf. United States v. Pettway, 129 Fed. App'x 583, 589 (11th Cir. 2005) (court's refusal to appoint stand-by counsel for pro se criminal defendant not in error where defendant stated that "any attorney appointed to represent him would not work on his behalf"). Additionally, a defendant has no right to court-appointed representation if she has the financial resources to hire counsel. United States v. Ellis, 154 F.R.D. 697, 699 (M.D. Fla 1993) (citation omitted). There is no evidence to suggest that Defendant would be financially eligible for court-appointed counsel had she requested such appointment.[3]

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[2] Should Defendant reconsider her refusal to file a financial affidavit with the court for the purposes of court-appointed representation, Defendant may file an appropriate motion or request for a hearing regarding the issue of waiver of counsel and/or any request for court-appointed stand-by counsel. This must be done in a timely manner; the court retains the discretion to deny such a request if trial would be delayed.

[3] At the hearing, Defendant stated that "her medicaid payments had been frozen." However, Defendant offered no evidence of financial inability to afford counsel. Further, the court notes that Defendant is a practicing dentist who holds a doctorate in dentistry. According to the indictment in this case, Defendant's taxable income is allegedly ranged from approximately $480,000-780,000 per year for the tax years in question (see Dkt 1). Although Defendant did not assert an unequivocal intent to hire an attorney to represent her during the hearing, Defendant suggested that if she could find an attorney to assist her who is not a member of the Florida Bar, she might consider hiring that person. Nothing in this order is intended to prevent Defendant from hiring an attorney, however, should Defendant decide to hire counsel to represent her, the court would then have to consider the qualifications of such individual, including membership in the Middle District of Florida Bar or a qualified attorney who is authorized to make special appearances in this

Because Defendant refuses the assistance of any counsel holding a Florida Bar number and there is no evidence before the court to suggest that Defendant is financially eligible for court-appointed counsel, stand-by counsel cannot be appointed to aid in the representation of Defendant. After consideration of this matter, however, the undersigned concludes that stand-by counsel should be appointed solely to protect the integrity and continuity of the proceedings. The role of stand-by counsel is a very limited one; stand-by counsel does not represent Defendant but is to serve exclusively on behalf of the court.[4]

Accordingly and upon consideration, it is ORDERED AND ADJUDGED that:

(1) Defendant Nancy Montgomery Ware's request to appear pro se and waive her Sixth Amendment right to counsel, including her right to appointed counsel, is GRANTED.[5]

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court. See Local Rule 2.02, M.D. Fla. The court's approval of retained counsel must be effectuated in a timely manner.

[4] Pursuant to Criminal Justice Act ("CJA"), stand-by counsel appointed in this manner under the court's inherent authority may be compensated as an "expert or consultant" pursuant to 5 U.S.C. § 3109. Guidelines for the Administration of the Criminal Justice Act and Related Statutes, vol. 7 ch. 2, pt. B ¶2.17.

[5] Any party desiring to appeal from this order shall file a motion for reconsideration by the district judge within ten (10) days of the date of this order. See 28 U.S.C. § 636(b)(1)(A).

(2) The court finds that stand-by counsel should be appointed for to serve exclusively on behalf of the court and a separate order will be entered identifying that individual.

DONE AND ORDERED in Tampa, Florida this 11th day of May, 2007.

/S/ Elizabeth A Jenkins
ELIZABETH A JENKINS
United States
Magistrate Judge

U.S.C.A. Const. Amend. VI-Jury Trials
United States Code Annotated

Constitution of the United States

Annotated

Amendment VI. Jury Trial for Crimes, and Procedural Rights

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C.A. § 3231

United States Code Annotated

Title 18. Crimes and Criminal Procedure

Part II. Criminal Procedure

Chapter 211. Jurisdiction and Venue

§ 3231. District courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the

States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

26 U.S.C.A. § 7201

I.R.C. § 7201

United States Code Annotated

Title 26. Internal Revenue Code

Subtitle F. Procedure and Administration

Chapter 75. Crimes, Other Offenses, and Forfeitures

General Provisions § 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

28 U.S.C.A. § 1291

United States Code Annotated

Title 28. Judiciary and Judicial Procedure

Part IV. Jurisdiction and Venue

Chapter 83. Courts of Appeals

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C.A. § 1254

United States Code Annotated

Title 28. Judiciary and Judicial Procedure

Part IV. Jurisdiction and Venue

Chapter 81. Supreme Court § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

USSG, § 2T1.1, 18 U.S.C.A.

United States Code Annotated

Federal Sentencing Guidelines

Chapter Two. Offense Conduct

Offenses Involving Taxation

1. Income Taxes, Employment Taxes, Estate Taxes, Gift Taxes, and Excise Taxes (Other Than Alcohol, Tobacco, and Customs Taxes)

§ 2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

(a) Base Offense Level:

(1) Level from §2T4.1 (Tax Table) corresponding to the tax loss; or

(2) 6, if there is no tax loss.

Federal Rules of Criminal Procedure, Rule 59

United States Code Annotated

Federal Rules of Criminal Procedure for the United States District Courts

IX. General Provisions

Rule 59. Matters Before a Magistrate Judge

(a) Nondispositive Matters. A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within 10 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.

JURY INSTRUCTION NO. 13

Tax Evasion
(General Charge)

Section 7201 of the Internal Revenue Code (26 U.S.C. § 7201) makes it a Federal crime or offense for anyone to willfully attempt to evade or defeat the payment of federal income taxes.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant owed a substantial income tax; and

Second: That the Defendant knowingly and willfully attempted to evade or defeat such tax.

The proof need not show the precise amount of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the Defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

The word "attempt" contemplates that the Defendant had knowledge and an understanding that, during the particular tax year involved, she had income which was taxable, and which the Defendant was required by law to report; but that she nevertheless attempted to evade or defeat the tax, or a substantial portion of the tax on that income, by willfully failing to report all of the income which she knew she had during that year.

Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid; whether as wages, commissions, or money earned for performing services. The tax is also levied upon profits earned from any business, regardless of its nature, and from interest, dividends, rents and the like. The income tax also applies to any gain derived from the sale of a capital asset. In short, the term "gross income" means all income from whatever source unless it is specifically excluded by law.

On the other hand, the law does provide that funds acquired from certain sources are not subject to the income tax. The most common non-taxable sources are loans, gifts, inheritances, the proceeds of insurance policies, and funds derived from the sale of an asset to the extent those funds equal the cost of the asset.

No. 08-1009

In the Supreme Court of the United States

NANCY MONTGOMERY WARE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN DICICCO
Acting Assistant Attorney General
ALAN HECHTKOPF
MARK S. DETERMAN
Attorneys
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QUESTION PRESENTED

Whether the court of appeals erred in refusing to review a magistrate judge's order finding that defendant waived her Sixth Amendment right to counsel, where the defendant did not object to that order before the district court.

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In the Supreme Court of the United States

No. 08-1009

NANCY MONTGOMERY WARE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A17) is not published in the *Federal Reporter* but is reprinted in 292 Fed. Appx. 845.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2008. A petition for rehearing was denied on November 10, 2008 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on February 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Middle District of Florida, petitioner was convicted of two counts of willfully attempting to evade tax, in violation of 26 U.S.C. 7201,

and three counts of willfully failing to file a tax return, in violation of 26 U.S.C. 7203. She was sentenced to 33 months of imprisonment, to be followed by three years of supervised release. Pet. App. A20-A25. The court of appeals affirmed. *Id.* at A3-A17.

1. Petitioner was a partner in a pediatric dentistry practice in Lakeland, Florida. For 1998 and 1999, petitioner reported more than $1 million in gross income on her individual income tax returns and paid federal income tax on that income. In 2000, petitioner requested that the partnership stop withholding federal income tax, Social Security tax, and Medicare tax from her earnings. Petitioner presented the partnership with "tax protestor" literature that falsely claimed that paying income tax was voluntary. Petitioner also opened two checking accounts for unincorporated associations that were not linked to her Social Security number. Pet. App. A7-A8; Gov't C.A. Br. 4-5.

Petitioner completed W-4 forms claiming that she was "exempt" from federal withholding. Based on those forms, the partnership stopped withholding taxes from petitioner's earnings. After receiving the W-4 forms, however, the IRS informed the partnership that petitioner was not exempt and sent petitioner a delinquency notice. When the partnership received the notification from the IRS, it began withholding taxes again. In 2004, petitioner left the partnership but continued to practice at the same location. Pet. App. A8-A9; Gov't C.A. Br. 6, 8, 11.

Petitioner failed to file tax returns for the tax years 2000 through 2004. The IRS calculated that petitioner owed a total of $362,212.24 in federal income taxes, excluding penalties and interest. Pet. App. A9, A11; Gov't C.A. Br. 17; see *id.* at 7-12.

2. A federal grand jury sitting in the Middle District of Florida returned an indictment charging petitioner with two counts of willfully attempting to evade tax, in violation of 26 U.S.C. 7201, and three counts of willfully failing to file a tax return, in violation of 26 U.S.C. 7203. Pet. App. A7.

At her initial arraignment, petitioner asked to be represented by her husband, who is not an attorney. The magistrate judge continued the arraignment for two weeks until it could hold a *Faretta* hearing. Minute Order (Apr. 18, 2007); see *Faretta* v. *California*, 422 U.S. 806 (1975).

At the hearing, petitioner acknowledged that she did not know of any authority that would allow her husband to represent her, and she requested to represent herself. Pet. App. A36-A37. The magistrate judge advised at the beginning of the hearing that an attorney with the Federal Public Defender's office was present and available for consultation should petitioner wish to "ask an experienced defense counsel any questions," but petitioner declined the opportunity. Gov't C.A. Br. 13 (citation omitted). The prosecutor then summarized the charges and the maximum penalties. *Id.* at 13-14. When the magistrate judge asked petitioner if she understood the charges and penalties, petitioner responded that she had heard the prosecutor but that "[t]here's no law making me liable. They've not established that there is a law making me, as an individual, liable." *Id.* at 14 (citation omitted); see *id.* at 13-14.

The magistrate judge reiterated that petitioner had a constitutional right to be represented by an attorney and that, if she submitted a financial affidavit showing that she lacked the financial resources to retain an attorney, the court would appoint someone to represent

her. Petitioner responded, "No, I don't wish to do that, but I do need the assistance of counsel." Gov't C.A. Br. 14 (citation omitted). The magistrate judge then explained that standby counsel would be available to assist petitioner if she chose to represent herself. Petitioner responded that she did not want to be assisted by anyone with "a bar number," based on her view that "anyone who has a bar number is beholding [*sic*] to the IRS." *Ibid.* (citation omitted); see Pet. App. A36-A37.

The magistrate judge asked petitioner why she sought to represent herself in this case. The following discussion ensued:

> THE DEFENDANT: I feel that I will retain all the rights that I came into this courtroom with if I represent myself and speak for myself.
>
> THE COURT: Okay.
>
> THE DEFENDANT: And I believe I can understand and read the manuals and follow along with the rules of court as long as we are following those rules.
>
> THE COURT: So, you, in effect, think that you can represent yourself better than somebody else could?
>
> THE DEFENDANT: Yes, I do.

Gov't C.A. Br. 15-16 (citation omitted). The magistrate judge then strongly urged petitioner not to represent herself, but petitioner reiterated that she still wished to do so. At the conclusion of the hearing, the magistrate judge reiterated, "Are you absolutely sure about this decision?" Petitioner responded, "Yes, absolutely." *Id.* at 16; Pet. App. A7.

The magistrate judge found that petitioner knowingly, intelligently, and voluntarily had waived her right

to counsel. Gov't C.A. Br. 16. The magistrate judge then issued a written order memorializing that ruling. Pet. App. A35-A40. Although the order expressly advised petitioner that she had ten days from the date of the order to seek review by the district court, *id.* at A39 n.5, she did not do so, *id.* at A13.

The court appointed the Federal Public Defender's office as standby counsel. Order (May 23, 2007); see Pet. App. A39-A40.

3. Petitioner pleaded not guilty and proceeded to trial pro se. The jury found petitioner guilty of all five charges. The district court sentenced petitioner to serve 33 months of imprisonment, to be followed by three years of supervised release; fined her $25,000; and ordered her to pay $362,212.24 in restitution. Pet. App. A20-A31.

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. A3-A17.

On appeal, petitioner argued for the first time that she did not knowingly and voluntarily waive her right to counsel. The court of appeals concluded that petitioner "waived this argument because she failed to object to the order of the magistrate judge that granted [her] request to represent herself." Pet. App. A13-A14. The court of appeals added that it therefore "lack[ed] jurisdiction to review that order." *Id.* at A14 (citing *United States* v. *Brown*, 441 F.3d 1330, 1352 (11th Cir. 2006), cert. denied, 549 U.S. 1182 (2007)).

ARGUMENT

As relevant here,[1] petitioner contends (Pet. 14-15) that the circuits are in conflict on the question whether,

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[1] On March 18, 2009, this Court requested that the government file a response "in Question No. 1 only."

in an appeal from a final judgment of a district court, the courts of appeals have jurisdiction to review a magistrate judge's decision on a nondispositive pretrial matter when no party sought review of that ruling by the district court. Further review on that question is not warranted. The recently adopted Rule 59 of the Federal Rules of Criminal Procedure provides that the failure to file timely objections to a magistrate judge's non-dispositive pretrial determination "waives a party's right to review." Fed. R. Crim. P. 59(a). Therefore, petitioner could not obtain relief in the court of appeals, even if it asserted jurisdiction over her unpreserved claim. The court's statement that it lacked jurisdiction was incorrect in the government's view, but the statement was unnecessary to its decision and does not warrant further review.

1. a. Under the Federal Magistrates Act, 28 U.S.C. 636, a district court may refer certain nondispositive pretrial matters to a magistrate judge for resolution, subject to review by the district court "where it has been shown that the magistrate's order is clearly erroneous or contrary to law." 28 U.S.C. 636(b)(1)(A). Dispositive pretrial matters and petitions for habeas corpus may also be referred to magistrate judges for appropriate proceedings, proposed findings of fact, and recommendations as to disposition. 28 U.S.C. 636(b)(1)(B) and (C).

In criminal cases, review of matters before a magistrate judge is governed by Rule 59. For both dispositive and nondispositive matters, Rule 59 provides that "[f]ailure to object in accordance with this rule waives a party's right to review." Fed. R. Crim. P. 59(a) and (b)(2). An objection is preserved if filed with the district court within ten days. *Ibid.*; see also 28 U.S.C. 636(b)(1) (codi-

fying the ten-day limit for appeals from "proposed findings and recommendations").

Rule 59's waiver provision drew on this Court's decision in *Thomas* v. *Arn*, 474 U.S. 140 (1985). Fed. R. Crim. P. 59 advisory committee's note (2005). In *Thomas*, this Court held that the courts of appeals could permissibly (but need not) adopt a rule that a litigant waives further review if she fails to file timely and specific objections to a magistrate judge's recommendation on a dispositive matter. 474 U.S. at 155. The Court observed that the rule under review in that case was a "non-jurisdictional waiver provision," and that the court of appeals "may excuse [a] default." *Ibid.*; see *id.* at 146. The advisory committee notes to Rule 59 explain the committee's view that the same would be true under that rule: "Despite the waiver provisions, the district judge retains the authority to review any magistrate judge's decision or recommendation whether or not objections are timely filed."

b. Rule 59 is dispositive here, as the court of appeals recognized. Pet. App. A13-A14 ("[Petitioner] waived this argument because she failed to object to the order of the magistrate judge that granted [petitioner's] request to represent herself. *See* Fed. R. Crim. P. 59(a)."). That waiver holding amply supports the court of appeals' conclusion that petitioner could not obtain any further review of her right-to-counsel claim.

Petitioner's only contention to the contrary (Pet. 19) is the assertion that Rule 59(a) "is a rule of procedure" that "does not speak to jurisdiction or appeals from final judgment." Although Rule 59(a) does not speak to jurisdiction, compliance with the rule *is* a prerequisite to appellate review. See Fed. R. Crim. P. 59 advisory committee's note (2005) ("Th[e] waiver provision is intended

to establish the requirements for objecting in a district court to preserve *appellate* review of magistrate judges' decisions.") (emphasis added). As the decision in *Thomas* (relied on by the drafters of Rule 59) makes clear, the purpose of the objection requirement is to preclude appeal *beyond* the district court when a party does not appeal *to* the district court. See, *e.g.*, 474 U.S. at 147-148 ("The [waiver] rule, by precluding appellate review of any issue not contained in objections, prevents a litigant from 'sandbagging' the district judge by failing to object and then appealing. Absent such a rule, any issue before the magistrate would be a proper subject for appellate review."). The waiver plainly extends to proceedings in the appellate courts.

That point is particularly clear in the context of a magistrate judge's ruling on a nondispositive matter, like the one here. Magistrate judges may be authorized to "hear and determine" those matters, 28 U.S.C. 636(b)(1)(A), and no formal action by the district court is required to adopt or ratify their rulings. Thus, petitioner cannot even make the argument that the litigant in *Thomas* unsuccessfully advanced: that the district court was required to exercise some form of review when adopting magistrate judges' recommended rulings on dispositive motions (which could in turn be reviewed on appeal). 474 U.S. at 149-150. This Court rejected that argument. See *ibid.*

2. Because the court of appeals correctly held that petitioner waived her argument under Rule 59(a), this case does not present any genuine issue about the court of appeals' jurisdiction to review a magistrate judge's ruling on a nondispositive matter in a criminal case where the defendant did not appeal to the district court. The court of appeals' non-precedential decision did re-

cite, based on circuit precedent that predated Rule 59, that it "lack[ed] jurisdiction." Pet. App. A14. But the court did not, as the government requested,[2] dismiss petitioner's appeal as to her challenge to her waiver of counsel. Instead, the court affirmed the judgment of conviction, precisely the appropriate disposition in light of the holding of waiver.

As explained in previous briefs to this Court, the government does not agree with the court of appeals' precedent concluding that a failure to object to a magistrate judge's ruling deprives the court of appeals of jurisdiction to consider that ruling on an appeal from final judgment.[3] The correctness of that precedent, however, does not present a significant question that warrants plenary review.

a. In the most relevant precedent, the court of appeals held that it lacked jurisdiction because "[a]ppeals from the magistrate's ruling must be to the district court." *United States* v. *Brown*, 299 F.3d 1252, 1260

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[2] The government's brief to the court of appeals in this case relied principally on Rule 59(a), but also cited the circuit precedent holding that the waiver has jurisdictional consequences, and asked that the appeal be dismissed. Gov't C.A. Br. 18, 20, 30.

[3] The government first asserted that position in its brief in *Brown* v. *United States*, suggesting that the Court grant the petition and remand to the Eleventh Circuit for further consideration. U.S. Br. at 5, *Brown* v. *United States*, 538 U.S. 1010 (2003) (No. 02-8263). The Court adopted that suggestion. After the Eleventh Circuit reaffirmed its view, *United States* v. *Brown*, 342 F.3d 1245 (2003), and Brown again sought certiorari, the United States reaffirmed its position on the jurisdictional issue, but opposed review, principally because proposed Rule 59(a) would resolve the matter; the issue arises only rarely in criminal cases; and Brown's claim would fail even if reviewed on the merits. U.S. Br. in Opp. at 5-7, *Brown* v. *United States*, 543 U.S. 823 (2004) (No. 03-9931). This Court denied certiorari. 543 U.S. 823 (2004).

(11th Cir. 2002) (brackets in original; citation omitted), vacated mem., 538 U.S. 1010, reinstated, 342 F.3d 1245 (11th Cir. 2003), cert. denied, 543 U.S. 823 (2004). But the appeal in that case (as in this one) was not taken directly from the magistrate judge's order. Rather, the defendant appealed from the final judgment of conviction entered by the district court in her case. The court of appeals had jurisdiction of that appeal pursuant to 28 U.S.C. 1291 (courts of appeals have jurisdiction of appeals from "all final decisions of the district courts"). And interlocutory rulings in a criminal case are appealable on entry of the final judgment. See *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam) (citing *DiBella* v. *United States*, 369 U.S. 121, 124 (1962)). Once the court of appeals acquires jurisdiction, Federal Rule of Criminal Procedure 52(b) prescribes the standard for review of a claim that was forfeited by not being presented to the district court (but was also not waived). That rule provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

The defendant in *Brown* sought review in this Court on those grounds. The government filed a brief agreeing that the court of appeals had jurisdiction and suggesting that this Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand for further proceedings. U.S. Br. at 5, *Brown* v. *United States*, 538 U.S. 1010 (2003) (No. 02-8263). This Court did so. 538 U.S. 1010 (2003). On remand, however, the court of appeals held that it was bound by the former Fifth Circuit's precedent in *United States* v. *Renfro*, 620 F.2d 497, 500, cert. denied, 449 U.S. 921 (1980), and could not reconsider that rule ex-

cept sitting en banc. *United States* v. *Brown*, 342 F.3d 1245, 1246 (11th Cir. 2003). This Court denied certiorari. *Brown* v. *United States*, 543 U.S. 823 (2004).

b. At the time the Court denied certiorari in *Brown*, the courts of appeals were divided on the question whether failure to object to a magistrate judge's ruling implicates the court of appeals' jurisdiction. Compare, *e.g.*, *United States* v. *Akinola*, 985 F.2d 1105, 1108-1109 (1st Cir. 1993), and *Brown*, 299 F.3d at 1260 (following *Renfro*, 620 F.2d at 500), with *United States* v. *Brown*, 79 F.3d 1499, 1504 (7th Cir.) (concluding that "failure to challenge before a district judge a magistrate's pretrial rulings * * * waives the right to attack such rulings on appeal," but that "this rule is not jurisdictional") (citation omitted), cert. denied, 519 U.S. 875 (1996), and *United States* v. *Polishan*, 336 F.3d 234 (3d Cir. 2003) (similar), cert. denied, 540 U.S. 1220 (2004), and *United States* v. *Abonce-Barrera*, 257 F.3d 959, 967-969 (9th Cir. 2001) (failure to challenge a magistrate judge's order on nondispositive pretrial issues has no effect on appealability).

That issue lacks prospective significance now that Rule 59 provides a rule of waiver in criminal cases.[4] In any case in which the claimant did not preserve an objection in the district court, Rule 52(b) limits the court

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[4] In civil cases, the analysis may differ because the relevant rule, Rule 72(a) of the Federal Rules of Civil Procedure, is phrased differently. Rule 72(a) provides that an objection to a magistrate judge's order on a nondispositive matter must be made within 10 days and that "[a] party may not assign as error a defect in the [magistrate judge's] order not timely objected to." Applying Rule 72(a), the courts of appeals have reached different conclusions about whether a party's failure to object deprives the appellate court of jurisdiction to review the order. See *Brown*, 79 F.3d at 1504 n.34 (citing cases).

of appeals to plain-error review. And as this Court explained in *United States* v. *Olano*, 507 U.S. 725 (1993), any objection that has been waived cannot be error, much less reversible plain error. See *id.* at 733-734. That principle applies to waivers under Rule 59 as to other waivers. Under those circumstances, no appellate relief would be possible, see *id.* at 732, whether or not the court has appellate jurisdiction.

In light of Rule 59, no issue of importance is implicated by the question presented.[5] Even before Rule 59, the issue arose only infrequently in criminal cases.

3. Petitioner's underlying contention that she did not knowingly and intelligently waive her right to counsel would not have resulted in reversal of her conviction even if the court of appeals had reviewed her claim for plain error. It is well established that a defendant has a Sixth Amendment right to conduct her own defense. *Faretta* v. *California*, 422 U.S. 806, 819-832 (1975). To waive her right to counsel, the defendant must be competent to stand trial and must knowingly, intelligently, and voluntarily waive her Sixth Amendment right. *Godinez* v. *Moran*, 509 U.S. 389, 400 (1993). Accordingly, a trial court's duty at a *Faretta* hearing is to establish that the defendant "knows what [s]he is doing and [that] h[er] choice is made with eyes open." *Faretta*, 422 U.S. at 835 (citation omitted). The court fulfilled that duty here.

Petitioner already had some familiarity with litigation at the time of her trial. She owned a copy of the Federal Rules of Evidence and the Federal Rules of

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[5] The Eleventh Circuit recently dismissed an appeal in part, citing *Brown* and *Renfro*, but the magistrate judge's order in that case was entered before Rule 59 took effect. *United States* v. *Schultz*, No. 06-11673, 2009 WL 1067393, at *5-*6 (Apr. 22, 2009).

Criminal Procedure; she had represented herself several times in civil litigation against her business partner; and she had been represented by counsel in connection with other business and personal matters. Gov't C.A. Br. 14-15. Petitioner also confirmed, "I believe I can understand and read the manuals and follow along with the rules of court as long as we are following those rules." *Id.* at 15. Petitioner was also well educated, holding a graduate degree in dentistry. *Id.* at 14.

The magistrate judge repeatedly urged petitioner to secure counsel and discussed, at some length, the dangers and disadvantages of self-representation. Gov't C.A. Br. 34-35. For instance, the magistrate judge pointed out that although petitioner obviously was well educated, "[t]he courtroom is a different arena," where things that cannot be anticipated likely will occur. *Id.* at 34 (brackets in original; citation omitted). She also cautioned petitioner, "[Y]ou are stepping out in new territory if you've never represented yourself in a criminal case." *Ibid.* (brackets in original; citation omitted).

Despite these admonitions, petitioner unequivocally stated that she wished to represent herself:

> THE DEFENDANT: Then I'll represent myself then.
>
> THE COURT: Are you sure about that?
>
> THE DEFENDANT: Yes. I'm positive.
>
> THE COURT: Okay. Has anyone promised you anything or threatened you in any way to get you to give up your right to have counsel represent yourself?
>
> THE DEFENDANT: No.

THE COURT: Are you absolutely sure about this decision?

THE DEFENDANT: Yes, absolutely.

Gov't C.A. Br. 32-33 (citation omitted). On this record, the magistrate judge committed no reversible plain error in finding that petitioner waived her right to counsel.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2009

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[6] Petitioner does not contend, nor does the record suggest, that she was incompetent to waive her rights or that a defective waiver at the hearing justifies her failure to heed the magistrate judge's admonition that objections be filed within ten days.